IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.M.JOSEPH

THURSDAY, THE 4TH JANUARY 2007 / 14TH POUSHA 1928

RP.No. 985 of 2005(Y)

AGAINST THE JUDGEMENT/ORDER IN OP.24353/2001 Dated 15/07/2005
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: PETITIONER/5TH RESPONDENT IN OP:

PERIMKAMANA ILLATHU SUBHADRA ANTHARJANAM
ALAPPADAMBA AMSOM & DESOM, ALAPPADAMBA P.O.,
VIA. PAYYANNUR, KANNUR DIST.

BY ADV. SRI.P.V.LOHITHAKSHAN
SMT.P.VIJAYAMMA

RESPONDENTS: PETITIONER & RESPONDENTS 1 TO 4 IN O.P:
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1. S.K. CHERIYA AKKANAMMA,
W/O. DAMODARAN NAMBOODIRI, RESIDING AT ELLIRINJI
DESOM, SREEKANDAPURAM AMSOM, P.O. KOOTUMUKHAM,
VIA. SREEKANDAPURAM, KANNUR DIST.

2. THE STATE OF KERALA,
REP. BY THE SECRETARY TO GOVERNMENT OF KERALA,
EDUCATION DEPARTMENT, SECRETARIAT,
THIRUVANANTHAPURAM.

3. THE ACCOUNTANT GENERAL,
KERALA, THIRUVANANTHAPURAM.

4. THE DEPUTY DIRECTOR OF EDUCATION,
KANNUR.

5. THE ASST. EDUCATIONAL OFFICER,
PAYYANNUR.

BY ADV. SMT.A.C.VIDHYA.
GOVERNMENT PLEADER SRI.T.T.MUHAMMED

THIS REVIEW PETITION HAVING BEEN FINALLY HEARD ON 04/01/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.M.JOSEPH, J.

R.P..No.985 OF 2005

Dated this the 4th day of January, 2007

ORDER

This court vide judgment under review found that the first respondent was legally wedded wife and that the marriage between the petitioner in the review petition and the late Sri.Damodaran Namboodiri can only be illegal and void. This finding was entered into on the basis that though the fifth respondent in the original petition was not served, she was declared as served and there was no counter affidavit and the allegation in the original petition was treated as uncontroverted . On the basis of the said finding and following the judgment of the Division Bench in **Radhamony Amma v. State of Kerala** (2001(3)KLT 49), it was found that it is the first respondent who is entitled to Family Pension.

2. In the present review petition it is pointed out that petitioner in the review petition was unaware of the pendency of

the original petition and it is only when Annexure A1 Telegram was received petitioner came to know about the judgment.

3. I heard learned counsel for the petitioner Adv.Sri.P.V.Lohithakshan and Adv.Smt.Vidhya on behalf of the respondents. I heard learned Government Pleader also.

4. Learned counsel for the petitioner would contend that it is case where the court was in error in allowing the original petition filed in the year 2001, having regard to the fact that the right accrued to the first respondent if at all in the year 1993 with the passing away of Sri.Damodaran Namboodiri. He points out that the petitioner was in receipt of the Family Pension till it was cancelled pursuant to the judgment. He would submit that in view of the law declared by the Apex Court, the original petition should have been dismissed on the ground of delay and laches. He also points out Annexure A2 registered receipt executed by the first respondent and her children in favour of the review petitioner for accepting the will and for the payment of the amount under the

will. Learned counsel would further contend that in Annexure A2 petitioner is described as " Wedded Wife". He would submit that therefore the first respondent is estopped from seeking the relief of Family Pension. It is also submitted by learned counsel for the petitioner that the first respondent has no moral right in view of her conduct in not even visiting her late husband. It is also pointed out that the second marriage with the review petitioner was with the consent of the first respondent as she was reluctant to stay with late Sri.Damodaran Namboodiri. It is also pointed out by learned counsel for the petitioner that petitioner is having two daughters, both of whom are married. There is nobody to look after her because as per the custom in the community, female children have no obligation to take care of the mother, it is submitted. It is pointed out that the department accepted the nomination of the petitioner as wife and the Division Bench judgment may not apply as such.

5. It is contended on behalf of the first respondent that first

respondent was the legally wedded wife of late Sri.Damodaran Namboodiri and they were married in accordance with the prevailing customs. She submitted that the first respondent had seven children out of the marriage with late Sri.Damodaran Namboodiri and now she is left with six children. At present she is 77 years old. She is illiterate and that is the reason for not filing the original petition in time seeking Family Pension, she submits.

6. Though this court proceeded on the basis that the allegation in the original petition that the first respondent is the legally wedded wife is uncontroverted for the reason that the fifth respondent in the original petition did not appear, even after petitioner's appearance in the form of this review petition there is no change in this fundamental position namely that the first respondent was the first wife of late Sri.Damodaran Namboodiri. There is no case as such pointing out that the marriage between the first respondent and late Sri.Damodaran Namboodiri is illegal. In fact petitioner who has accepted the will would be bound by the

recitals in the will which include the recital that first respondent is the first wife of late Sri.Damodaran Namboodiri. If that is so, the fundamental basis of the judgment remains unaltered. No doubt there remains the argument of the learned counsel for the petitioner that this court was in error allowing the original petition at this distance of time. No doubt that the petitioner has approached this court only in the year 2001. Exts.P3 and P4 representations are dated in the year 2000. But the question of delay or laches is a question which is essentially to be considered in the light of the larger issue as to how best is the interest of justice served. I cannot shut my eyes in this context to the fact that the first respondent had six children at the time of filing of the original petition. I cannot equally ignore the fact that she is 77 years of age. The first respondent has two daughters. One is admittedly employed. Both are married. I cannot also brush aside the contention of the learned counsel for the first respondent that the first respondent is an illiterate lady.

7. In totality of the circumstances, I would at any rate think that no error apparent on the face of the record warranting a review arise on account of my interference in the matter. Reliance placed on Annexure A2 may not really advance the case of the petitioner. It would only evidence the acceptance of the amount under the will and acceptance of the second marriage and it would not make the second marriage legal. Section 11 of the Hindu Marriage Act declares that the marriage contracted during the subsistence of the existing marriage is void and illegal. Learned counsel for the petitioner would contend that in the absence of a declaration by the competent court on a petition presented, this court should not have granted the relief under Article 226 of the constitution. I am not impressed by this argument. I think it is not necessary to drive the widow to file a petition seeking declaration that the marriage is void. As held in the Division Bench judgment the position that the marriage contracted during the subsistence of an existing marriage is void cannot be disputed for the purpose of

claiming family pension on the basis that family pension does not form part of the legal estate of the Government servant. This is particularly so when the crucial facts necessary to enter finding that the marriage between the petitioner and the late Sri.Damodaran Namboodiri is contracted during the subsistence of a valid marriage between the first respondent and late Sri.Damordarn Namboodiri is not in dispute. It does not warrant any investigation at all to arrive at the finding that the marriage between the petitioner and late Sri.Damodaran Namboodiri is void. In fact learned Government Pleader points out the circular No.76/88/Fin. dated 12-10-1988, which reads thus

> "The Government of India have desired that all State Government should ensure that the grant of family pension to a second wife did not arise since a second marriage by a Hindu male after the commencement of Hindu Marriage Act, 1955 (18th May 1955) will be nullify under the said Act. The position is the same for Christians also as their Personal Law prohibits Polygamy and Polyandry rule 93(i) of the Government Servants Conduct Rules makes it clear that no Government servant who has a wife living shall contract another marriage without first obtaining permission of the government. Similarly, no female Government servant shall marry any

> person who has a wife living, without first obtaining the permission of the Government. In the event of more than one person staking a claim as the spouse of a Government servant, the Pension Sanctioning Authorities/Heads of Departments shall examine the legality of the marriage of the Government servant before sanctioning family pension/death-cum-retirement gratuity due to the family and categorically settle the identity of the proper claimant before sanctioning the Family Pension/Death-cum-Retirement Gratuity. In cases of having more than one widow as mentioned in rule 90(7) (i), Part III, Kerala Service Rules which may be rare, and in other similar doubtful cases, before sanctioning payment of family pension-death-cum-retirement gratuity, the Government in the Finance Department shall be consulted. The Pension Sanctioning Authorities/Heads if Departments are also requested to ensure that only the legally entitled persons get the benefit of family pension/death-cum-retirement gratuity."

8. In such circumstances I would think that there is absolutely no merit in the contention of the petitioner. I feel that the principle laid down by the Division Bench will apply to the facts of this case as it is not in dispute that the first respondent is the wife of late Sri.Damodaran Namboodiri. The contention of the petitioner is that the Division Bench judgment which is relied on has no application to the facts of this case and that is a case where

nomination was in favour of the brother. In the said case the employee excluded his wife while declaring the members of his family in Form 5A. It is pointed out that in this case late husband had given a valid declaration that the petitioner is his wife and therefore this court committed error of law in declaring first respondent as his legally wedded wife without relegating parties to civil court. I cannot be unmindful to the terms of the circular relied on by the Government Pleader also. In the facts of this case it cannot be in the region of dispute that the first respondent continued to be the wife of Sri.Damodaran Namboodiri till his death. There is no case of any dissolution of any marriage. In such circumstances I do not think that there is any ground to entertain this review petition and therefore the same is dismissed.

K.M.JOSEPH
JUDGE.

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